Mailed: June 21, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Wyeth Holdings Corporation

v.

Walgreen Co.

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Opposition No. 91151771
to application Serial No. 76289706
filed on July 24, 2001

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Marie V. Driscoll of Fross Zelnick Lehrman & Zissu, P.C. for Wyeth Holdings Corporation.

Francis Kowalik of Walgreen Co. for Walgreen Co.

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Before Seeherman, Quinn and Chapman, Administrative Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

Wyeth Holdings Corporation (a Maine corporation)[1] has opposed the application of Walgreen Co. (an Illinois corporation) to register on the Principal Register the mark shown below

[1] This opposition was filed by American Cyanamid Company (a Maine corporation). During the course of this proceeding opposer filed a motion to amend the caption to reflect its name change to Wyeth Holdings Corporation, which was granted by the Board in a November 22, 2004 order.

for "dietary and nutritional supplements" in International Class 5. The application is based on applicant's assertion of a bona fide intention to use the mark in commerce.

Opposer asserts as grounds for opposition that "at least as early as 1978" it "commenced use of the trademark FROM A TO ZINC in connection with its dietary supplements"; that opposer owns Registration No. 1360049 issued September 17, 1985, under Trademark Act Section 2(f), 15 U.S.C. Section 1052(f), for the mark FROM A TO ZINC for "vitamin and mineral preparations" in International Class 5; and that applicant's mark, when used on its goods, so resembles opposer's previously used and registered mark, as to be likely to cause confusion, mistake, or deception.

In its answer applicant denied the salient allegations of the notice of opposition.[2]

The record consists of the pleadings; the file of applicant's application; opposer's notice of reliance on a status and title copy of opposer's pleaded Registration No.

[2] Although the notice of opposition contained numbered paragraphs setting forth the basis of opposer's claim of damage, applicant provided only a general denial of the salient allegations. Applicant also pleaded evidentiary matters in its answer relating to its use of its mark and specific information regarding applicant's general denial of opposer's likelihood of confusion claim. Statements made in pleadings cannot be considered as evidence on behalf of the party making them; such statements must be established by competent evidence during the time for taking testimony. See Kellogg Co. v. Pack'Em Enterprises Inc., 14 USPQ2d 1545 (TTAB 1990), aff'd, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991); and Times Mirror Magazines, Inc. v. Sutcliff, 205 USPQ 656 (TTAB 1979). See also, TBMP §704.06(a) (2d ed. rev. 2004).

1360049; and opposer's testimony, with exhibits, of Robert Amo, senior product manager of opposer.[3] Applicant took no testimony and offered no other evidence in this case.

Both parties filed briefs on the case.[4] Neither party requested an oral hearing.

Our determination of likelihood of confusion is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, In re Majestic Distilling Company, Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). Based on the record before us in this case, we find that confusion is likely.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods or services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d

[3] Applicant did not attend the deposition of opposer's witness.
[4] Applicant has made a number of factual assertions in its brief, but they are not supported by any evidence. Therefore, they have been given no consideration. See BL Cars Ltd. V. Puma Industria de Veiculos S/A, 221 USPQ 1018 (TTAB 1983); and Abbott Laboratories v. TAC Industries, Inc., 217 USPQ 819 (TTAB 1981). See also, TBMP §704.06(b) (2d ed. rev. 2004).

1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

We turn first to a consideration of the parties' goods as identified in applicant's application and in opposer's registration. Applicant's goods are identified as "dietary and nutritional supplements" while opposer's goods are identified as "vitamin and mineral preparations." Opposer contends that applicant's identification of goods is "broad and clearly includes within its category" the goods of opposer. (Opposer's brief, p. 12.) In its brief, applicant acknowledges that its goods "are similar to the goods of Opposer." (Applicant's brief, p. 9.) We find that opposer's identified goods are included within the scope of applicant's broadly identified goods; therefore, for purposes of the likelihood of confusion analysis the goods are legally identical.

Because these goods are identical and there are no limitations on trade channels or purchasers, the goods must be considered to move in the same channels of trade and be directed to the same purchasers. See Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); Interstate Brands Corp. v. McKee Foods Corp., 53 USPQ2d 1910 (TTAB 2000); and The Chicago Corp. v. North American Chicago Corp., 20 USPQ2d 1715 (TTAB 1991). In addition, opposer has submitted evidence that its

goods are sold in applicant's stores (Amo dep., p. 15), and applicant acknowledges that "Opposer's goods may be sold at Applicant's stores" (applicant's brief, p. 9). We find that the parties' goods are legally identical and move in the same channels of trade to the same classes of customers.

Where applicant's goods are identical to opposer's goods, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than it would be if the goods were not identical. Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Turning now to a consideration of the parties' marks, i.e., the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression, we find that the marks are similar.

Citing Kellogg Co. v. Pack'Em Enterprises Inc., supra (at footnote 2), applicant argues that although the degree of similarity between the parties' marks is but one factor in the likelihood of confusion analysis, it is the single factor that outweighs all others in this proceeding and favors applicant. We disagree.

The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of appearance, sound, meaning and commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the

recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See Spoons Restaurants Inc. v. Morrison Inc., 23 USPQ2d 1735 (TTAB 1991), aff'd unpub'd (Fed. Cir. June 5, 1992).

Applicant argues that the only similarity between the marks is its use of the letters "A" and "Z" in its mark and use of the terms "A" and "ZINC" in opposer's mark. However, we consider this similarity to be significant. The connotation of the "A THRU Z" portion of applicant's mark draws from the same well as opposer's FROM A TO ZINC mark. They convey the same general idea and stimulate the same mental reaction, namely, that the products run the full gamut of nutrients.[5] As the Board explained in United Rum Merchants Limited v. Fregal, Incorporated, 216 USPQ at 219 (TTAB 1982):

> It is well established that similarity of connotation or commercial impression alone is sufficient to support a finding of likelihood of confusion between marks. [A]nd this is true even if the marks exhibit aural and optical dissimilarity when they convey the same general idea or stimulate the same mental reaction. (Citations omitted.)

Furthermore, the "A THRU Z" portion of applicant's mark is the most prominent element. Although marks must be considered in their entireties, it is well-settled that one

[5] Furthermore, we note that the letter "Z" (as it appears in applicant's mark) denotes, among other possible meanings, "Zinc [Chemical symbol is Zn]." Acronyms, Initialisms & Abbreviations Dictionary, vol. 1, part 4, p. 4692 (29th ed. 2001). To those familiar with this abbreviation, the similarity between the marks is even stronger.

feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). The stylization of applicant's mark emphasizes the "A THRU Z" portion of the mark. The "A" is by far the largest element of the mark, and the "Z" is the second largest element. When applicant's mark is viewed in its entirety, the "A THRU Z" portion of the mark creates a significant impression because it is set off with large letters at its beginning and end, and it is the first line of the mark -- appearing above the word "ADVANTAGE." Consumers will read the "A THRU Z" portion first because of its prominence and position.

In terms of sound, appearance, meaning and commercial impression, we find that the similarities between the marks outweigh any points of dissimilarity.

Another du Pont factor we consider in this case is that of fame. We note that opposer does not specifically argue that its mark is famous. Rather, opposer contends its mark is "well known." Applicant, too, concedes this point, admitting in its brief "that Opposer's mark is fairly well known." (Applicant's brief, p. 10.)

In view thereof, we find that opposer's mark FROM A TO ZINC is a strong mark which is entitled to a broad scope of protection. Moreover, opposer points out that there is no

evidence of third-party use of its mark. These factors favor opposer.

Applicant argues that although its application is based on an intent to use the mark in commerce, applicant has used the "A THRU Z" portion of its mark on vitamin products for over 20 years without any known instances of actual confusion. Applicant's assertion is without any evidentiary support. Accordingly, we have not considered applicant's statements as they relate to the nature and extent of any actual confusion or to the length of time during which there has been concurrent use without evidence of actual confusion.

Considering all of the evidence of record as it pertains to the relevant du Pont factors, we find that a likelihood of confusion exists. We have considered applicant's arguments to the contrary but are not persuaded.

Decision: The opposition is sustained.